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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 562

M. L. TOWNSEND, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.

OPINIONS BELOW.

The opinions of the Court of Appeals (R. 100, 116) are reported in 185 F. 2d 378. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 65-91) are unreported.

JURISDICTION.

The decree of the court below (R. 107) was entered on September 11, 1950. Petitioner's ap-

plication for rehearing was denied on November 22, 1950 (R. 116). The petition for certiorari was filed on February 19, 1951. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether petitioner, having failed to object before the Board although fully apprised of his opportunity to do so, is precluded by Section 10 (e) of the Act from challenging in the courts the validity of the Board's action in taking official notice of facts found by it in a prior proceeding.

2. Assuming question 1 is answered in the negative, whether the Board may properly take official notice of facts found by it in a prior proceeding.

3. Whether an automobile dealer whose annual sales of new automobiles exceed $70,000 is engaged in an activity affecting commerce within the meaning of the Act if the automobiles are manufactured outside the State but are purchased by him, under an exclusive franchise, from a distributor located within the State.

4. Whether the first Intermediate Report automatically became the order of the Board under Section 10 (c), notwithstanding that the Board had extended the time for filing exceptions thereto and had remanded the case to the Trial Examiner

before the expiration of the extended time for filing exceptions.

5. Whether Section 9 (d) of the Act, which requires the Board to file the record of a representation proceeding when it seeks judicial enforcement of a certification issued therein, is applicable where the Board, without objection, takes official notice of the commerce facts found in a prior proceeding.

STATUTES INVOLVED.

The pertinent provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Secs. 1005, *et seq.*), and of the Rules and Regulations of the Board are set forth in the Appendix, *infra,* pp. 20-23.

STATEMENT.

A. The Business of the Petitioner.

Petitioner is engaged in Santa Maria, California, in the purchase and sale of new and used automobiles, automotive parts and supplies, and fuels and lubricants, and also in the repair and painting of automotive vehicles. His purchase and sale of new automobiles is confined to Hudson automobiles, for which petitioner is a "Master Dealer" operating under a "Hudson Distributor-Master Dealer Sales Agreement", with exclusive rights to sell Hudson automobiles within the limits of Santa

Maria (R. 45-47; 11-19, 35-37).[1] The other party to the agreement is the Hudson Sales Corporation at whose premises in Los Angeles petitioner picks up all his new Hudson cars (R. 46; 15, 21-22). During the year 1947, petitioner's total sales for his entire business organization were in the amount of $346,341, of which $70,770,[2] represented sales of new Hudson automobiles purchased under the agreement from Hudson Sales Corporation (R. 45-46; 15-19, 35-37).

Hudson Sales Corporation is the direct distributor in the area for the Hudson Motor Car Co. The sales corporation has no factory and does not manufacture parts or assemble automobiles. (R. 46-47; 29-30). In an earlier proceeding before the Board (*Hudson Sales Corporation*, 77 NLRB 378), the Board found that during 1946 the latter corporation purchased Hudson automobiles, parts, and accessories valued in excess of $1,000,000, of which more than 75 percent was received from points outside the State of California (R. 66).

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[1] In the following statement, the references preceding the semicolon are to the Board's findings; the references following the semicolon are to the supporting evidence.

[2] The balance of petitioner's sales included used cars valued at $111,803, new automobile parts valued at $84,093, and service sales (including labor of mechanics and sale of gas and oil) valued at $79,737 (R. 45-46; 15-19). The Trial Examiner found that the foregoing operations of petitioner, exclusive of sales of new Hudson automobiles, are intrastate operations which do not affect interstate commerce. The Trial Examiner noted that the record did not indicate where the automobile parts were manufactured. (R. 46)

B. The Unfair Labor Practices.

In March and April 1948, during the course of an organizing campaign conducted at petitioner's garage by the International Association of Machinists, petitioner discharged three employees because of their union activity, interrogated several employees as to their union membership and activity, and warned or threatened other employees that union activity on their part would result in their discharge (R. 69-82). Upon these facts, not challenged here or in the court below, the Board found that petitioner violated Sections 8 (a) (1) and (3) of the Act (R. 84, 88-89).

C. The Proceedings Before the Board.

Following the customary proceedings under the Act, the Trial Examiner on October 27, 1948, issued an Intermediate Report in which he recommended dismissal of the complaint on the ground that the record before him did not establish that the new automobiles handled by petitioner "emanate[d] from without the State of California," and the evidence would therefore not support a finding that petitioner was engaged in operations affecting commerce within the meaning of the Act. (R. 44-50). The General Counsel and the Union each filed a motion to extend the time for filing exceptions to the Intermediate Report, together with a motion for remand to the Trial Examiner and for the reopening of the record, for the pur-

pose of adducing additional evidence with respect to the interstate aspect of petitioner's operations (R. 51-56). In support of his motion the General Counsel specifically directed the Board's attention to its decision in *Hudson Sales Corporation,* 77 NLRB 378, which "conclusively shows that 75 percent of all automobiles and other products sold by Hudson Sales Corporation are shipped to the Sales Corporation from points outside the State of California" (R. 52). Thereafter the General Counsel from time to time secured extensions of time within which to file exceptions, in order that the Board might first act upon his motion for remand (R. 62-64). The last extension of time for filing exceptions expired March 1, 1949 (R. 64).

On February 16, 1949, and before the expiration of time for filing exceptions, the Board issued an order remanding the case to the Trial Examiner (R. 65). The Board, taking judicial notice of the prior proceeding before it in *Hudson Sales Corporation, supra,* found that "a substantial portion of the [petitioner's] business involved the sale of new Hudson automobiles which were originally shipped from points outside the State of California" (R. 66). The Board also rejected petitioner's contention that it lacked jurisdiction because none of the cars came to petitioner directly, or were shipped by him across State lines (*ibid*).

Accordingly, the Board found (R. 67) that petitioner "is engaged in commerce within the mean-

ing of * * * the Act and that it would effectuate the policies of the Act to assert jurisdiction here." The Board remanded the proceeding to the Trial Examiner for the preparation and issuance of a Supplemental Intermediate Report, setting forth his findings of fact, conclusions of law, and recommendations with respect to the unfair labor practices alleged in the complaint (R. 67). At the same time, the Board specifically granted permission to the parties to file exceptions to its Decision within 20 days after service of the Trial Examiner's Supplemental Intermediate Report (R. 67, footnote 4).

The Trial Examiner on April 6, 1949, issued a Supplemental Intermediate Report, finding that petitioner's operations were within the scope of the Act and that petitioner had committed the unfair labor practices described at p. 5, *supra* (R. 68-83). The Trial Examiner recommended that petitioner be ordered to cease and desist from his unfair labor practices, to reinstate the discriminatorily discharged employees with back pay, and to post appropriate notices (R. 68-87).

The Trial Examiner, in noting (R. 68) that the Board had found that petitioner was engaged in commerce within the meaning of the Act, called attention to the fact that the Board had granted the parties permission to file exceptions to its Decision within 20 days after service of the Supplemental Intermediate Report. The Trial Exam-

iner also directed the attention of the parties to Section 203.48 of the Rules and Regulations of the National Labor Relations Board, Series 5, as amended August 18, 1948 (12 F. R. 5656, 5662; 13 F. R. 4872; redesignated as Section 102.48 in 14 F. R. 78), which provides that in the event no exceptions are filed with the Board, the findings, conclusions, recommendations, and recommended order of the Trial Examiner shall "be adopted by the Board, and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes" (R. 87).

On April 6, 1949, the Board entered an order transferring the case to the Board. On the same day, petitioner and his counsel were served with copies of that order and with copies of the Supplemental Intermediate Report. Petitioner at no time filed any exceptions to the Supplemental Intermediate Report and Recommended Order, or to the Decision and Order Remanding Case to Trial Examiner. (R. 88). Under Section 10 (c) of the Act and Section 203.48 of the Board's Rules and Regulations, time for filing such exceptions expired on April 26, 1949. Accordingly, on May 12, 1949, the Board adopted the findings, conclusions, and recommendations of the Trial Examiner as contained in the Supplemental Intermediate Report and issued the Order there recommended (R. 88).

D. The Proceedings in the Court of Appeals.

Petitioner resisted enforcement of the Board's order on the ground that the Board was not authorized to take official notice of its decision in the *Hudson Sales Corporation* case or of the facts set forth therein. Petitioner also contended that even if the Board could take official notice of the fact that the new automobiles which petitioner obtained from Hudson Sales Corporation were shipped to the latter from outside the State, the Board erred in concluding that petitioner's business affected commerce within the meaning of the Act.

The court below unanimously held that under Section 10 (e) of the Act petitioner's failure to object before the Board to the taking of official notice of the facts in the *Hudson Sales* case precluded his challenging the validity of that action before the court (R. 101-104). The court below also held, one member dissenting, that petitioner in handling new automobiles produced outside the state was engaged in an activity affecting commerce within the meaning of the Act (R. 104-106). Accordingly the court entered a decree enforcing the Board's order (R. 107-110).

On October 2, 1950, petitioner filed a petition for rehearing (R. 110) in which for the first time he urged that the order of dismissal recommended by the trial examiner in his first Intermediate Report became the order of the Board because no exceptions had been filed within the time permitted

by Section 10 (c) of the Act.[3] The court overruled this contention and held that, assuming the recommended order had become the order of the Board, the Board had not lost control over it and could, by virtue of Section 10 (d) of the Act, modify or set it aside at any time until a transcript of the record is filed in a court (R. 116-117).

ARGUMENT.

1. Section 10 (e) of the Act, in providing that "no objection which has not been urged before the Board * * * shall be considered by the court", precludes petitioner from challenging the validity of the Board's finding that the new Hudson automobiles handled by petitioner are produced outside the state. Although, as the court below observed (R. 101), petitioner was twice advised (R. 67, 68) of his right to file exceptions to the Board's action in taking official notice of its decision in *Hudson*

[3] This contention is without factual basis. As previously noted (*supra*, pp. 5-6), the record shows that when the General Counsel filed his motion for remand and for the reopening of the record, he filed simultaneously, and within the time permitted by Section 10(c) of the Act, a motion for the extension of time within which to file exceptions to the Intermediate Report. Section 10 (c) of the Act and Section 203.46 of the Board's Rules and Regulations provide for enlargement of time by the Board for the filing of exceptions. Thereafter, the time for filing exceptions was, upon motion, extended from time to time, to permit the Board to act upon the motion to remand. When the Board issued its decision remanding the case, the time within which to file exceptions, as thus extended, had not expired.

Sales Corporation, supra, and to the finding in this case, based thereon, that the new Hudsons handled by petitioner were produced outside the state, petitioner filed no exceptions, and hence cannot now argue that the Board erred in these respects. *National Labor Relations Board* v. *Cheney California Lumber Company,* 327 U. S. 385, 388; *Marshall Field and Company* v. *National Labor Relations Board,* 318 U. S. 253, 255.[4]

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[4] The courts of appeals have uniformly applied this rule. *National Labor Relations Board* v. *Cutler,* 158 F. 2d 677 (C.A. 1); *National Labor Relations Board* v. *Draper Corporation,* 159 F. 2d 294, 298 (C.A. 1); *National Labor Relations Board* v. *Parkers Prairie Cooperative Creamery Assn.,* 154 F. 2d 455, 457 (C.A. 8); *National Labor Relations Board* v. *Kinner Motors, Inc.,* 154 F. 2d 1007 (C.A. 9); *National Labor Relations Board* v. *Van De Kamp's Holland-Dutch Bakeries, Inc.,* 154 F. 2d 828 (C.A. 9); *National Labor Relations Board* v. *Winter,* 154 F. 2d 719, 722, n. 7 (C.A. 10); *National Labor Relations Board* v. *Dairy Center, Inc.* (C.A. 1, No. 4476); *National Labor Relations Board* v. *Israel Putnam Mills, Inc.* (C.A. 2, January 10, 1950); *National Labor Relations Board* v. *Gunn* (C.A. 3, No. 9822); *National Labor Relations Board* v. *Cordele Manufacturing Co.,* 172 F. 2d 225 (C.A. 5); *National Labor Relations Board* v. *Davis,* 172 F. 2d 225 (C.A. 5); *National Labor Relations Board* v. *Amory Garment Company,* 24 LRRM 2274 (C.A. 5); *National Labor Relations Board* v. *Lancaster Foundry Corporation* (C.A. 6, No. 10847); *National Labor Relations Board* v. *Ullin Box and Lumber Company* (C.A. 7, No. 9588); *National Labor Relations Board* v. *Burk,* 177 F. 2d 1021 (C.A. 8); *National Labor Relations Board* v. *Griffin-Goodner Grocery Co., Inc.,* 170 F. 2d 152 (C.A. 10). Cf. *Halsted* v. *Securities & Exchange Commission,* 182 F. 2d 660, 669 (C.A. D.C.) certiorari denied, 340 U.S. 834.

2. In any event, the Board properly took official notice of the commerce facts found by it in the *Hudson Sales Corporation* case. The right of the Board to take official notice is recognized by Section 10 (b) of the Act, which provides that an unfair labor practice proceeding "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure * * *," and by Section 7 (d) of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. § 1005), which provides that "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." Petitioner's difficulty is that he never asked the Board that he be "afforded an opportunity to show the contrary" of the facts officially noticed.

Contrary to petitioner's contention (Pet., pp. 13-17) the ruling below does not conflict with *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, and *United States* v. *Abilene & Southern R. Co.,* 265 U. S. 274. These decisions do not disapprove of the taking of official notice by an administrative agency where adequate safeguards are provided, such as those afforded to petitioner here. As one commentator has stated:[5]

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[5] Davis, *Official Notice,* 62 Harv. L. Rev. 537, 578 (1949).

These three cases, *Louisville & Nashville, Abilene & Southern,* and *Ohio Bell,* are the three principal cases in which Supreme Court holdings have imposed restrictions upon the use by an administrative agency of extra-record information. All three cases are consistent with the major proposition that extra-record information may be used so long as its use is properly made known to the parties so that the parties may have opportunity to rebut or explain in the appropriate way.

This Court has on several occasions sustained agency action in which the agency took judicial notice of its records in reaching its decision. *Market Street R. Co.,* v. *Railroad Comm'n,* 324 U. S. 548, 561-562; *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 529-530; *Securities Comm'n* v. *Chenery Corp.,* 332 U. S. 194, 204; *Tang Tun* v. *Edsell,* 223 U. S. 673, 680-681; *Crichton* v. *United States,* 56 F. Supp. 876, 880 (S. D. N. Y.), affirmed without opinion, 323 U. S. 684. In the *Pierce* case, *supra,* this Court, in commenting upon the decisions cited by petitioner here, said that "it has not undertaken to make a fetish of sticking squarely within the four corners of the specific record in administrative proceedings or of pinning down such agencies, with reference to fact determinations, even more rigidly than the courts in strictly judicial proceedings" and that "the mere fact that the determining body has looked beyond the record

proper does not invalidate its action unless substantial prejudice is shown to result." (327 U. S. at p. 530).

Equally untenable is petitioner's contention (Pet., pp. 10-11) that the decision below conflicts with other decisions of courts of appeals.[6] The cases cited by petitioner involved the propriety of taking judicial notice of a prior proceeding for the purpose of establishing an estoppel by judgment. In the instant case, on the other hand, although the Board took official notice of the fact that petitioner's supplier received automobiles from points outside the state, the fact so noticed did not thereby become undisputable or conclusive, and petitioner was "not prevented from disputing the matter by evidence, if he believe[d] it disputable" (Wigmore on Evidence (3rd ed., 1940) Sec. 2567). Apparently petitioner did not believe the matter disputable, as he has never claimed and does not now claim that the fact officially noticed—the out-of-state origin of the new Hudson automobiles—was untrue.

3. The holding of the court below (R. 104, *supra*, p. 9) that petitioner's activities affect commerce because a labor dispute which caused a cessation of petitioner's operations would necessarily curtail the movement of new Hudson automobiles into the state, is manifestly correct. Petitioner errs in

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[6] *Divide Creek Irrigation Dist.* v. *Hollingsworth*, 72 F. 2d 859 (C. A. 10); *Paridy* v. *Caterpillar Tractor Company*, 48 F. 2d 166 (C. A. 7), certiorari denied, 278 U. S. 617; *National Surety Co.* v. *United States*, 29 F. 2d 92 (C. A. 9).

suggesting (Pet., pp. 12-13) that the decision below conflicts with *National Labor Relations Board* v. *Shawnee Milling Co.*, 184 F. 2d 57 (C. A. 10). In the instant case the basis for the applicability of the Act is petitioner's handling of new automobiles produced outside the state; in the *Shawnee* case the materials handled at the plant in question were of local origin, and the asserted basis for the applicability of the Act was the fact that the employer operated other plants which were engaged in commerce. The decision that the Shawnee Company was not subject to the Act is thus not in conflict with the decision that petitioner's operations affect commerce.[6a] See *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 648; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 604-605; *Wickard* v. *Filburn*, 317 U. S. 111, 123-125; *Mandeville Island Farms Inc.*, v. *American Crystal Sugar Company*, 334 U. S. 219, 229, 234, 236; *United States* v. *Women's Sportswear Association*, 336 U. S. 460, 464; *United States* v. *Sullivan*, 332 U. S. 689, 696-697; *Allen Bradley Co.* v. *Local Union No. 3, etc.*, 325 U. S. 797, 800.

4. Petitioner's contention (Pet., pp. 21-23) that the original Intermediate Report recommending dismissal of the complaint automatically became the order of the Board because the General Coun-

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[6a] The Tenth Circuit has recently expressly limited its *Shawnee* decision to the peculiar facts of that case. *National Labor Relations Board* v. *Tri-State Casualty Ins. Co.*, No. 4139, decided March 21, 1951.

sel did not file exceptions thereto is without factual foundation. As previously indicated (*supra,* pp. 5-6), the Board had granted the General Counsel several extensions of time within which to file exceptions, pending consideration of the General Counsel's motion for a remand. When the Board issued its decision remanding the case, the General Counsel's time for filing exceptions had not yet expired. Under Section 10 (c), the Intermediate Report becomes the order of the Board only "if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize * * *." Since the General Counsel was not in default in the matter of filing exceptions when the Board remanded the case to the Trial Examiner, the recommended order of the Trial Examiner never became the order of the Board.

Even assuming, *arguendo,* that the Intermediate Report had automatically become the order of the Board, the Board had the power under Section 10 (d) to "modify or set aside, in whole or in part, any finding or order made or issued by it," inasmuch as the transcript of the record was still in its possession and had not been filed in a court. Petitioner's objection that this can be done only "upon reasonable notice" was satisfied when the Board provided in its Decision (R. 67) that any party could file exceptions to the Decision within twenty days after service of the Trial Examiner's Supplemental Intermediate Report.

5. Petitioner's contention that because the Board took official notice of the *Hudson Sales* case it was required by Section 9 (d) to supply a certified copy of the record therein as part of the record in this case rests upon a misconception of Section 9 (d).[7] It is clear from the legislative history that the purpose of that Section was to give an employer an opportunity to have a representation proceeding reviewed if he refused to abide by the Board's certification, and was thereafter proceeded against by the Board upon charges that he had refused to bargain with the certified union. As stated in Senate Report No. 573, 74th Cong., 1st Sess., p. 14 (Legislative History of the National Labor Relations Act, 1935, Vol. II, Gov. Print. Off. 1949, p. 2314):[8]

> Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. * * * But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representa-

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[7] The contention is obviously an afterthought, urged for the first time after the decision of the Court of Appeals (R. 112). Manifestly, if this contention had been timely urged, the alleged defect could have been remedied by having the Board supply a certified transcript of the proceedings in the *Hudson Sales* case.

[8] See also, Comparison of S. 2926 (73rd Congress) and S. 1958 (74th Congress) Senate Committee Print, p. 3 (Legislative History of the National Labor Relations Act, 1935, Vol I, Gov. Print. Off. 1949, p. 1323).

> tives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by an aggrieved party in the Federal courts in the manner provided in Section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election.

In the case at bar, of course, there is no suggestion that the Board's order is in any way "predicated upon the election" in the *Hudson Sales* case; it is a purely fortuitous circumstance that the facts of which the Board took official notice were developed in a representation proceeding rather than in an unfair labor practice case.[9]

CONCLUSION.

The decision of the court of appeals is correct and presents neither a conflict with other decisions

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[9] Petitioner's suggestion (Pet., p. 18) that the decision of the court below is in probable conflict with *National Labor Relations Board* v. *Foote Bros. Gear & Machine Corp.*, 311 U. S. 620, is patently without merit. As is evident from petitioner's own analysis of that case, the *Foote Bros.* decision did not involve the issue which petitioner seeks to raise here, but whether the printed record could be in narrative form instead of question and answer form.

nor any substantial question warranting review. The petition for certiorari should be denied.

Respectfully submitted,

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March 1951.

APPENDIX.

The relevant provision of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Sec. 1005) is as follows:

"Sec. 7 (d) * * * Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

The relevant provisions of the Rules and Regulations of the N. L. R. B., Series 5, as amended August 18, 1948 (12 F. R. 5656; 13 F. R. 4872; 14 F. R. 78) are as follows:

"Sec. 203.46 *Exceptions or supporting briefs; time for filing; where to file; service on parties, extension of time; effect of failure to include matter in exceptions; oral arguments.*—(a) Within 20 days or within such further period as the Board may allow from the date of service of the order transferring the case to the Board, pursuant to section 203.45, any party may file with the Board in Washington, D. C., an original and six copies of a statement in writing setting forth exceptions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motions or objections), together with the original and six copies of a brief in support of said exceptions, and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the

same period, file an original and six copies of a brief in support of the intermediate report and recommended order. Copies of such exceptions and briefs shall immediately be served on each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose. Requests for leave or for extension of the time in which to file exceptions or briefs under authority of this section shall be in writing and copies thereof shall be immediately served on each of the other parties.

"(b) No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceedings.

* * * * *

"Sec. 203.48 *Action of Board upon expiration of time to file exceptions to intermediate report.*— (a) In the event no statement of exceptions is filed as herein provided, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order shall be adopted by the Board and become its findings, conclusions and order, and all objections and exceptions thereto shall be deemed waived for all purposes."

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. III, Secs. 141 *et seq.*), are as follows:

"Sec. 9 * * * (d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"Sec. 10 * * * (b) * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after

service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) * * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *"

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